

JUN 1 1990

(29)

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

**PACIFIC MUTUAL LIFE INSURANCE COMPANY,**  
*Petitioner.*

vs.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,  
ALMA M. CALHOUN and EDDIE HARGROVE,**  
*Respondents.*

ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ALABAMA

**BRIEF OF PETITIONER**

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PETITION FOR CERTIORARI FILED FEBRUARY 7, 1990  
CERTIORARI GRANTED APRIL 2, 1990

## QUESTIONS PRESENTED

The following questions are presented by the Petitioner:

1. Whether Alabama law, as applied below, violates Due Process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.
2. Whether Alabama law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a *respondeat superior* theory.
3. Whether the amount of punitive damages in this case was excessive, in violation of Pacific Mutual's Due Process right to be free of grossly excessive, disproportionate damages awards.
4. Whether the suit below, although nominally civil, must be considered sufficiently criminal in nature as to the punitive damages awarded therein to entitle Pacific Mutual to certain protections under the Fifth and Fourteenth Amendments to the United States Constitution.
5. Whether Alabama law is discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment, by encouraging disproportionate punishment without rational basis.
6. Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by judicial review and the potential for a remittitur.

## RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Pacific Mutual Life Insurance Company states that it is a California mutual insurance company. It has no parent company, non-wholly owned subsidiary or affiliate.

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## PETITIONER'S BRIEF ON THE MERITS

Pacific Mutual Life Insurance Company ("Pacific Mutual") respectfully submits its brief on the merits as follows:

### OPINIONS BELOW

The opinion of the Jefferson Circuit Court is unreported. [Pet. App. A1-A16.]<sup>1</sup> The opinion of the Supreme Court of Alabama [Pet. App. B1-B16] is reported as *Pacific Mutual Life Ins. Co. v. Cleopatra Haslip, et al.*, No. 87-482 (Sept. 15, 1989) (to be reported at 553 So.2d 537 (1990)).

### JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The judgment of the Supreme Court of Alabama was entered on September 15, 1989. A timely petition for rehearing was denied on November 9, 1989. [Pet. App. C1.] On December 22, 1989 Justice Kennedy issued an order granting Pacific Mutual's application for stay, which was confirmed by the full Court on January 8, 1990. [Pet. App. E1.]

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

<sup>1</sup> Documents in the Appendix to the Petition will be cited "Pet. App." those in the Petitioner's Reply to Respondents' Brief in Opposition "Pet. Reply Cert.," and those in the Joint Appendix "JA."

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Article I, § 10[1], of the United States Constitution provides in part:

"No state shall . . . pass any . . . ex post facto Law . . ."

#### **STATEMENT OF THE CASE**

##### **A. THE PARTIES**

Petitioner Pacific Mutual is a mutual life insurance company, owned by its policyholders [Calif. Ins. Code § 4010].

Respondents Cleopatra Haslip, Cynthia Craig, Alma Calhoun and Eddie Hargrove ("respondents") are employees of the City of Roosevelt ("the City") in the State of Alabama. Respondents were participants in an insurance plan sponsored by the City in which Pacific Mutual provided individual life insurance coverage.

##### **B. THE ACTION BELOW**

Respondents' action against Pacific Mutual involved a suit seeking punitive damages for the misconduct of one of Pacific Mutual's nonexclusive soliciting agents, Lemmie L. Ruffin, Jr. ("Mr. Ruffin"), who at the time of the alleged acts was acting on behalf of another company, Union Fidelity Life Insurance Company ("Union Fidelity") with respect to a health insurance policy issued by Union Fidelity, not Pacific Mutual. [RT 470-75.]<sup>2</sup>

Pacific Mutual, in an amendment to answer, raised the federal constitutional challenges presented here. [JA 11-14, 25-27, 29-35.] The jury found Pacific Mutual to be vicariously liable for punitive damages for Mr. Ruffin's acts. Pacific Mutual renewed its constitutional challenges by a motion for directed verdict [JA 37-44], and by a post-trial motion [CT 277-325].

Pacific Mutual appealed, again raising its federal constitutional challenges, which were rejected in the opinion of the Alabama Supreme Court affirming the trial court judgment. [Pet. App. B1.] Pacific Mutual petitioned for rehearing, which was denied. [Pet. App. C1.]

##### **C. STATEMENT OF FACTS**

###### **1. Respondents' Prior Coverage**

Respondents are employees of the City of Roosevelt. The City allowed its employees to purchase a group health insurance policy through the municipality. [RT 91.]

###### **2. Mr. Ruffin's Solicitation**

Sometime in 1981, Mr. Ruffin, who was then a soliciting agent for both Pacific Mutual and Union Fidelity, forwarded a mail solicitation to the City [RT 431-32], and later met with the City's mayor, city attorney and city clerk. [RT 92,

<sup>2</sup> The Clerk's Transcript will hereinafter be designated as "CT." The Reporter's Transcript of the proceeding will hereinafter be designated as "RT."

96, 132, 431-32.] Mr. Ruffin presented his Pacific Mutual business card and discussed the City's interest in obtaining health and life insurance. [RT 92-93, 96, 98-99, 429, 435-36.]

### **3. Pacific Mutual Did Not Issue Group Health Policies**

While Pacific Mutual issued individual life policies to City employees, it did not underwrite group health insurance policies for municipalities. [RT 442-43.] Pacific Mutual did, however, allow its agents to broker business with other insurance companies. [RT 469-70.] Mr. Ruffin at that time was also a licensed agent of Union Fidelity. Union Fidelity, a separate and distinct company from Pacific Mutual, did issue group health insurance to municipalities. [RT 262-63.]

### **4. The Separate Applications to Union Fidelity and Pacific Mutual**

Mr. Ruffin submitted a proposal to the City indicating he would place life insurance with Pacific Mutual and health insurance with Union Fidelity. [RT 439, 442-43, 473, 475-76.] The City approved the proposals, and on August 19, 1981, Mr. Ruffin completed separate applications for the City and its employees for group health coverage with Union Fidelity and individual life policies with Pacific Mutual. [RT 219-21, 283, 312-16, 335.] Mr. Ruffin then submitted the City's application for health insurance to Union Fidelity. The City's application for life insurance was submitted to Pacific Mutual. Pacific Mutual and Union Fidelity are separate companies without any affiliation. [RT 262-63.]

### **5. Issuance of the Separate Health and Life Policies**

Union Fidelity approved the health application and issued group health coverage to the City effective September 1, 1981. [RT 255.] Union Fidelity later confirmed the health coverage by letter with the city clerk. [RT 138-39.] Pacific Mutual approved the applications for individual life insurance and began issuing life insurance coverage to the City's employees. The premium checks for both the life and health

insurance policies were collected by Mr. Ruffin. [RT 115-16, 141-42.]

### **6. Pacific Mutual's Agents' Contract Forbade Mr. Ruffin's Conduct**

An arrangement was made with Union Fidelity to have premium billings sent to Mr. Ruffin at his office in the Pacific Mutual branch office in Birmingham. [RT 271.] Under Mr. Ruffin's sales agent's contract with Pacific Mutual, Mr. Ruffin was specifically forbidden from collecting any premiums beyond the initial premium submitted with the application. [JA 122-25.] Nevertheless, Mr. Ruffin instructed the city clerk to make all premium checks payable to him and to remit the premiums directly to him. [RT 141.]

Pacific Mutual's agent in charge of the Birmingham office, Patrick Lupia, was also licensed with Union Fidelity and other companies. [RT 741.] Mr. Lupia was unaware Mr. Ruffin was collecting premium checks from the City or having the premium checks made payable to him individually. [JA 83-84.] It appears that Mr. Ruffin failed to remit premiums received by him from the City to Union Fidelity. Union Fidelity sent lapse notices to respondents in care of Mr. Ruffin and Mr. Lupia. Mr. Ruffin apparently did not forward them to respondents. [RT 143, 147, 161-62, 256, 270.]

### **7. Cancellation of Union Fidelity's Health Coverage**

In the fall of 1981, the Union Fidelity health coverage for the City was cancelled. Shortly thereafter, Mr. Ruffin attempted to obtain replacement health insurance coverage for the City's employees. [RT 454-56, 479.] He appears to have submitted applications therefor to Union Fidelity and to John Alden Insurance Company. [RT 455, 456, 479.] Mr. Ruffin's deposition testimony, which was read at trial, was that he continued to collect the health portion of the premiums so that he would have the premium money to submit to the replacement carrier. [RT 455.] An application for health insurance was submitted by Mr. Ruffin to both

John Alden and Union Fidelity. Mr. Ruffin received preliminary approval and was assigned a case number. [RT 455, 456-58.] However, before a policy was ever issued, respondent Cleopatra Haslip was hospitalized. [Id.]

#### **8. Mrs. Haslip's Hospitalization**

Mrs. Haslip was hospitalized for a kidney infection on January 23, 1982 before a replacement policy was ever issued. [RT 455, 456-58.] Mrs. Haslip incurred \$2,500 in hospital bills. Because the hospital could not confirm insurance coverage it required her to pay a cash sum toward her final bill upon her discharge. The hospital records for Mrs. Haslip's hospitalization do not list Pacific Mutual or Union Fidelity as the insurer, but instead list another company, Commercial Insurance Company. A claim for the hospitalization was never filed with Pacific Mutual. [RT 235.]

Mr. Ruffin testified that Mrs. Haslip called him after her discharge, angered about having to write a check to the hospital and demanded her premium payment back. [RT 458-60, 480-82.] With the deletion of Mrs. Haslip, there were not enough participating employees for issuance of the replacement policy, so Union Fidelity issued a premium refund check to Mr. Ruffin, which he said he attempted to tender to the city clerk, who refused to take the check. [RT 460.] Mr. Ruffin then placed the funds into his wife's checking account and did not return the funds to Union Fidelity or Pacific Mutual. [JA 71-72.]

#### **9. The Litigation**

##### **a. The Pleadings**

Respondents commenced this action on May 25, 1982 in the Jefferson Circuit Court alleging that Mr. Ruffin collected premiums but failed to remit them to the insurers so that respondents' coverage lapsed without their knowledge. The complaint claimed damages against Pacific Mutual and Mr. Ruffin for fraud, breach of contract and bad faith. [JA 3-10.] Union Fidelity was not named as a defendant. Respondents

amended the complaint several times. [JA 11-17, CT 66-68.] Pacific Mutual, in an amended answer, raised federal constitutional challenges to an award of punitive damages. [JA 29-35.]

##### **b. The Trial**

The case was submitted to the jury on respondents' fraud claims on both the health and life insurance policies against Pacific Mutual.

##### **c. The Punitive Damage Jury Instructions**

Following the trial court's charge on the issue of liability, the jury was instructed that once it determined there was liability for fraud, it could award punitive damages in its discretion. The court charged as follows:

"Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

"This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as

shown by the evidence and the necessity of preventing similar wrongs." [JA 103-106.]

**d. The Verdict**

On August 7, 1987 the jury rendered a verdict in favor of each of the respondents and determined that Pacific Mutual was liable for Mr. Ruffin's acts on an apparent authority *respondeat superior* basis, as follows:

Cleopatra Haslip	—	\$1,040,000; <sup>3</sup>
Cynthia Craig	—	\$12,400;
Alma Calhoun	—	\$15,290;
Eddie Hargrove	—	\$10,288.

[CT 342-43.]

Pacific Mutual timely moved for new trial, or in the alternative, judgment notwithstanding the verdict, again raising its constitutional issues, which was denied on December 11, 1987. [Pet. App. A1.]

**e. Pacific Mutual's Appeal**

Pacific Mutual raised a number of state law grounds of error, and raised each of the constitutional arguments regarding the award of punitive damages set forth in the Questions Presented section, above.

**f. The Alabama Supreme Court Decision**

The Alabama Supreme Court, in a 5 to 2 decision affirmed the judgment below on September 15, 1989. [Pet. App. B1-B16.]

<sup>3</sup> Mrs. Haslip's claim was as to the Union Fidelity health insurance policy. Pacific Mutual was therefore fined on a *respondeat superior* basis with respect to insurance it did not issue. In final argument, Mrs. Haslip claimed actual damages of \$3,923.84, aggregated into a request for compensatory damages of \$200,000, and punitive damages of \$3,000,000 [R.T. pp. 810, 812, 814]. In their reply to Pacific Mutual's Petition For Rehearing before the Alabama Supreme Court, plaintiffs categorized the general verdict as containing a punitive damages award of \$1,040,000. [Pet. Reply Cert. App. C1.]

Justice Maddox and Justice Steagall of the Alabama Supreme Court voted to vacate the punitive damages award, finding that the punitive damages award in this case violated the Due Process Clause of the Fourteenth Amendment. They also concluded that Alabama's judicial review processes did not cure the violation. [Pet. App. B14-B16.]

**g. Pacific Mutual's Petition for Rehearing**

Pacific Mutual filed a timely petition for rehearing regarding the constitutional validity of punitive damages, citing the concurrences in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. \_\_\_, 109 S.Ct. 2909 (1989). The Alabama Supreme Court denied that petition by an order dated November 9, 1989. [Pet. App. C1.]

**SUMMARY OF ARGUMENT**

**1. Standardless Jury Discretion.** Alabama law for determining the amount of punitive damages, and the jury instruction in this case authorized thereunder, are impermissibly vague and incomprehensible, and therefore void under the Due Process Clause of the Fourteenth Amendment, because they contain no standard for determining the amount to be awarded.

Punitive damages are punishment, and therefore the standard of scrutiny for vagueness should be similar to that in criminal cases. The Due Process rules regarding void-for-vagueness apply in civil actions and apply as to the determination of the severity of punishment.

The jury instruction in this case told the jury that if it chose to punish by an award of punitive damages, in determining the amount it should consider the "character and degree of the wrong" and the "necessity of preventing similar wrongs." The instruction is contentless and hopelessly vague as to (i) under what circumstances punishment is deserved, (ii) the relative degree of punishment to be imposed, and

(iii) the range within which punishment might properly be imposed.

Prior decisions of this Court have incorporated into the Fifth and Fourteenth Amendments the concerns of the Ex Post Facto Clauses as to fair notice of penalty and prohibition of retroactive changes in punishment adverse to the defendant. The punitive damages award here violated this fundamental principle of legality, that punishable conduct be defined and the penalty be set prior to commission of forbidden conduct.

The vagueness of Alabama law was such that no standard at all was supplied to the jury, which was left free to punish selectively and arbitrarily and to give free reign to bias, prejudice and wealth redistribution inclinations, in violation of both Due Process and Equal Protection guarantees of the Fourteenth Amendment.

**2. *Respondeat Superior.*** Due Process requires that corporations not be punished on a *respondeat superior* basis where, as here, the acts of the agent were not performed in the business of the corporation, with intent to benefit the corporation.

Here, the fraudulent intent of Mr. Ruffin cannot be imputed to Pacific Mutual consistently with Due Process because, at the time Mr. Ruffin diverted the premiums on the Union Fidelity policy, he was acting for himself, with respect to the policy of another company. An agent stealing from the principal cannot be deemed to have been acting with intent to benefit the principal, nor can such theft be a valid basis for punishment under Due Process.

**3. Excessiveness of the Award.** Civil penalty awards are excessive in violation of Due Process if grossly disproportionate to the harm caused. Here, the award was in excess of \$1,000,000, where actual damages from nonpayment of medical bills under the Union Fidelity policy, for which no claim was ever made, was \$3,923.94. Under any test of excessiveness, the award imposed on Pacific Mutual on an

apparent authority basis for acts of Mr. Ruffin of pocketing premiums, was excessive. If Pacific Mutual was involved in the conduct at all, the premiums were stolen from it. Any award in such circumstances is excessive.

**4. Criminal Procedural Protections.** Punitive damages are punishment, and in this case, severe punishment. Under the tests to determine the requirements or procedural Due Process, additional trial procedural protections are required to establish the appropriate level of confidence in the result, in view of the risk to defendants in these cases. Such protections, as relevant to this case, are a beyond a reasonable doubt standard of proof, unanimous jury, an upper limit on awards, and bifurcation of the trial to try underlying liability before trial of punitive damages issues.

Failure to accord these protections, other than unanimous jury, to Pacific Mutual at the trial herein, violated Pacific Mutual's right to Due Process and requires vacation of the award.

**5. Judicial Review Did Not Cure.** The reviewing courts in Alabama had no better standards by which to review the jury award than the jury had in rendering it. The various factors cited by the Alabama Supreme Court to be considered in reviewing punitive damages awards amount to no more than a test of excessiveness. Further, the trial court did not hold a hearing to consider such factors, and the reasons cited by that Court as upholding the award are unrelated to such factors. Judicial review merely transferred standardless discretion to the reviewing courts, to make a judgment upon bases which would have been equally invalid had the court initially set the punishment. It is submitted that the punitive damages award imposed upon Pacific Mutual should be vacated.

**I. ALABAMA LAW, AS HERE APPLIED, AND PUNITIVE DAMAGES DOCTRINE GENERALLY, VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES AS A MATTER OF "MORAL DISCRETION," WITHOUT ADEQUATE STANDARDS AS TO THE AMOUNT NECESSARY TO PUNISH AND WITHOUT A NECESSARY RELATIONSHIP TO THE AMOUNT OF ACTUAL HARM CAUSED**

Alabama law and the jury instruction below which that law authorized are impermissibly vague and indefinite regarding the severity of punishment to be imposed in a punitive damages award, in violation of the Due Process Clause of the Fourteenth Amendment.

The Due Process clause of the Fourteenth Amendment provides, "... [N]or shall any state deprive any person of life, liberty, or property, without due process of law..."

**A. Punitive Damages Are Punishment, Imposed Through State Action, And As Such Are Subject To Due Process Requirements.**

Punitive damages under Alabama law,<sup>4</sup> and under the laws of nearly all other states,<sup>5</sup> are imposed expressly for the purpose of retribution and deterrence. These are punishment purposes [*Bell v. Wolfish*, 441 U.S. 520 (1979)].

State action is present in this case, because actions by state courts and judicial officers, in their official capacities, including enforcement in litigation among private parties, of private agreements, state law, and common law policy, is

<sup>4</sup> *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984).

<sup>5</sup> 2 L. Schlueter and K. Redden, *Punitive Damages* (2d Ed. 1989), pp. 168-270.

state action within the Fourteenth Amendment [*Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883); *American Fed. of Labor v. Swing*, 312 U.S. 321 (1941); *Shelley v. Kraemer*, 334 U.S. 1 (1948)].

State action is further present because the imposition of punitive damages is not a private right, but is a public interest in retribution and deterrence; and plaintiffs in such actions act as private attorneys general in seeking to effect that interest [*In Re Paris Air Crash*, 622 F.2d 1315, 1319-1320 (9th Cir. 1980), cert. denied 449 U.S. 976 (1980)].

The fact that the punishment<sup>6</sup> is imposed in a civil action among private litigants does not insulate the matter from Due Process scrutiny [*A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *Jordan v. De George*, 341 U.S. 223, 231 (1951); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966); *Jacobs v. Board of School Commissioners*, 490 F.2d 601, 605 (7th Cir. 1973)].

In *A.B. Small Co. v. American Sugar Refining Co.*, above, an action to recover for the breach of two contracts for the sale of sugar to a dealer, defenses were asserted that the contracts were unlawful as violating the Lever Act, which made unlawful any "unjust or unreasonable . . . charge in . . . dealing with any necessaries," or "to exact any excessive price for necessities." These defenses were successfully demurred to as violating the Due Process Clause of the Fifth Amendment.

In upholding this ruling that the Lever Act violated the plaintiff's Due Process rights in the context of a civil suit, this Court stated, at page 239:

"The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such

<sup>6</sup> "Punishment" will be used in this brief to refer to the punitive damages goals of retribution and deterrence.

as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases."

The fact that states have chosen to enforce punishment through civil actions by private attorneys general does not affect Constitutional requirements. In *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966), this Court held that the placement of a civil label on a statute did not affect the application of Due Process principles. While economic regulations may be subjected to a less strict vagueness test [*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)], it is submitted that where, as in punitive damages cases, punishment is to be imposed for proscribed conduct, a level of scrutiny should be given similar to that applied to criminal sanctions. As noted in prior decisions of this Court, punitive damages awards are "quasi-criminal,"<sup>7</sup> "serve the same function as criminal penalties"<sup>8</sup> and are private fines imposed to punish and deter conduct.<sup>9</sup> Close scrutiny is additionally appropriate because of the stigma and loss of reputation which attaches to a punitive damages award. [See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)].

<sup>7</sup> *Smith v. Wade*, 461 U.S. 30, 59 (1983), Rehnquist, J., dissenting.

<sup>8</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-84 (1971), Marshall, J., dissenting.

<sup>9</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

**B. The Jury Instruction On Punitive Damages In This Case, Which Conformed To Alabama Law, Gave The Jury Unlimited Discretion To Set The Amount Of Punishment To Be Imposed. This Violated Pacific Mutual's Right To Due Process Under The Fourteenth Amendment.**

Alabama punitive damages law, and the jury instructions it authorized in this case provided no meaningful standards whatsoever for determining the amount of punishment to be imposed. As a result, both the law and jury instruction, which accurately stated it, are impermissibly vague and indefinite. The resulting award against Pacific Mutual is therefore invalid.

**1. Basic Due Process Required Adequate Standards To Limit Jury Discretion In Determining The Severity Of Punishment.**

Laws forbidding or requiring conduct must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he or she may act accordingly. Vague laws may trap the innocent by not giving fair warning. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Const. Co.*, 269 U.S. 385, 393, 395 (1926); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921)].

In *Grayned v. City of Rockford*, above, this Court stated, at 408 U.S., pages 108-109:

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

These principles apply as well to the prescription of the range of punishment as to the definition of forbidden or required conduct. [*United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987)]. Where, as here, the range of permissible punishment was not stated in a law to be enforced, this basic policy decision was left to the jury and reviewing judges "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

The same Due Process concerns apply in the case of civil suits involving the consequences of forbidden conduct [*A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925)].

## 2. The Jury Instruction In This Case, Which Properly Stated Alabama Law, Was Hopelessly Vague And Incomprehensible As A Basis For Determining Punishment.

In this case the trial court charged the jury:

"... [I]f you find fraud, you may in your discretion award what is known as punitive damages.

"...

"This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant ...

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." [RT 895, 898].

This jury instruction is incomprehensibly vague and indefinite, and told the jury it could do as it pleased. The two criteria stated are contentless and meaningless as stand-

ards for a decision on whether to punish or how much to punish. "The character and degree of the wrong" is hopelessly vague as a basis for determining what conduct deserves punishment under what circumstances. Similarly, "the necessity of preventing similar wrongs" set forth no meaningful basis upon which the jury could decide whether Pacific Mutual deserved punishment, and if so, how much punishment was necessary or appropriate.<sup>10</sup>

The jury was left to make these decisions based only upon their biases or visceral reactions arising from their individual temperaments, backgrounds and societal concerns, and were therefore free to punish selectively and give reign to bias, prejudice and wealth distribution tendencies. Due Process must rest on a firmer foundation. [See *Roller v. Holly*, 176 U.S. 398, 409 (1900)].

As stated by Justice Brennan (concurring) regarding a very similar instruction, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. \_\_\_, 109 S.Ct. 2909 at page 2923:

"Guidance like this is scarcely better than no guidance at all ... The point is ... that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."

In this case, which again is typical, the jury was, as noted by Justice Brennan in *Browning-Ferris* [109 S.Ct. 2909 at page 2923], "left largely to [itself] in making this important, and potentially devastating, decision."

<sup>10</sup> Alabama case law recognizes that no legal measure limits this jury discretion [*Dowling v. Garner*, 195 Ala. 493, 70 So. 150 (Ala. 1915); *Hogan v. Alabama Power Co.*, 351 So.2d 1378, 1382 (Ala. 1977); *Charter Hospital Of Mobile, Inc. v. Weinberg*, to be published at 558 So.2d 150, 1990 Ala. Lexis 17 (Jan. 12, 1990), Houston, J., concurring].

This Court has noted the arbitrary and unpredictable results of this unguided discretion in prior decisions.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court invalidated punitive damages under state law standards in defamation cases, and stated, at page 350:

"In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views...."

In *Rosenblom v. Metromedia, Inc.*, 403 U.S. 29 (1971), Justice Marshall, dissenting, analyzed punitive damages, in a libel case, in terms directly applicable to the Due Process concerns raised here by Pacific Mutual, stating at pages 82-84:

"... This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.... These awards are not to compensate victims; they are only windfalls.... [N]or is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty."

In *Electrical Workers v. Foust*, 42 U.S. 42 (1979), this Court banned punitive damages in union representation cases, noting, at page 50, that "the impact of these windfall recoveries is unpredictable and potentially substantial."

In *Bankers Life and Casualty Ins. Co. v. Crenshaw*, 486 U.S. 71 (1988), Justice O'Connor, concurring, noted with respect to the similar law and procedures in Mississippi, at pages 87-88:

"... This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court banned punitive damages in suits against municipal corporations in 42 U.S.C. § 1983 actions.

In *Smith v. Wade*, 461 U.S. 30 (1983), cogent objections to punitive damages generally were set forth (Rehnquist, J., dissenting).

The concerns regarding punitive damages expressed in the above cases are, it is submitted, Due Process concerns, applicable here.

Because punitive damages awards in large measure depend upon the degree to which the plaintiff's counsel has succeeded in arousing the anger of the jury toward the defendant, the awards, under present procedures, depend upon the idiosyncratic reactions of each jury. This fact, and its consequences, were commented upon in *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381 (1984), as follows, at page 388:

"The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or

the courts as to 'how much' is necessary to punish and deter." (Emphasis added.)

This is exactly the arbitrary and discriminatory enforcement condemned by Due Process.

Because the decision of whether or not to award punitive damages is committed to the moral discretion of each jury, imposition of such punishment is necessarily arbitrary and unpredictable. *Devlin* recognized that what may outrage one jury, and lead it to award substantial punitive damages, may leave another jury unmoved. The constitutional invalidity of this type of situation was described by this Court in *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) in which this Court stated that many types of behavior can be restricted or even prohibited but not constitutionally, "through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a [law enforcement officer] is annoyed." [See also *Jenkins v. Werger*, 564 F.Supp. 806, 808 (D. Wyo. 1983)].

Neither may juries be allowed to pursue their personal predilections.<sup>11</sup> [*Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Goguen*, 415 U.S. 566, 575 (1974)].

Juries at common law had no right to determine punishment in a criminal case [see IV Blackstone, *Commentaries*, pp. 354-355, 366-369, 371 (1st Ed. Reprint); *Crowe v. State*,

485 So.2d 351, 363-364 (Ala.Cr.App. 1984), *rev'd. on other grounds* 485 So.2d 373 (Ala. 1985), *cert. denied*, 477 U.S. 909 (1986)].<sup>12</sup>

The effect of the arbitrary power given to juries in awarding punitive damages under Alabama law has led an additional justice of that court to rethink his position since the opinions below in this case, in which he voted with the majority.

In *Charter Hospital of Mobile, Inc. v. Weinberg*, 558 So.2d 150, 1990 Ala. Lexis 17 (Jan. 12, 1990), released for publication April 16, 1990, Justice Houston, concurring in the result, which vacated the punitive damages award on state law grounds, appears to have been concerned because of widely differing verdicts in two cases in which he viewed the conduct as being the same. Justice Houston stated, at 1990 Ala. Lexis 17, pages 20-23:

"... I recently noted that, for the same conduct, one insurance company and its special agent were punished by a punitive damages award of \$21,130.86 ... and another insurance company and its special agent were punished by a punitive damages award of \$2,490,000 .... The instructions given to the juries in those two cases were substantially the same. ... [T]he standard by which the jury is to gauge the amount of punitive damages, if any, that it is to award is incomprehensibly vague and unintelligible. ... Under such a 'standard,' one

<sup>11</sup> It is recognized that jury sentencing in criminal matters is permitted in some states, and that this court, in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), expressly stated, in footnote 8 at page 405, that it intended in that decision "to cast no doubt whatsoever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." It is submitted that it is the lack of such "legally prescribed limits" which singularize the punitive damages award procedures in this case and render them Constitutionally invalid.

<sup>12</sup> The common law right of juries to determine the amount of punitive damages appears in large part to be a result of the perceived inadequacy of the compensatory damages then available to compensate for all detriment, such as emotional distress. See *Tullidge v. Wade*, 95 Eng. Rep. 909 (1769). The vastly expanded scope of civil damages available today invalidates such a consideration. England, in *Rookes v. Barnard* (1964) A.C. 1129, 1221; 1 All Eng. Rep. 367, 411, re-examined punitive damages, and severely limited their availability.

jury can award \$21,130.86 and another \$2,490,000 for the same 'wrong.' This does not comply with the requirement of procedural due process under the Alabama Constitution."

Punishment was imposed upon Pacific Mutual by a jury acting under instructions so vague as to provide no standards at all for determining the relative culpability of Mr. Ruffin's conduct and the amount appropriate to punish Pacific Mutual therefore vicariously. This absence of standards for determining punishment violated Pacific Mutual's right to Due Process under the Fourteenth Amendment.

**C. The Absence Of Prior Establishment Of The Punishment To Be Imposed On Pacific Mutual for Mr. Ruffin's Conduct Violated Pacific Mutual's Right to Due Process.**

The Due Process Clause of the Fourteenth Amendment requires that permitted punishment be established before commission of the punishable acts. Although prohibition of changes in permitted punishment adverse to the defendant has been the province of the Ex Post Facto Clauses,<sup>13</sup> prior decisions of this Court have found the concerns of the Ex Post Facto Clauses to be so basic to the concepts of fundamental fairness embodied in the Due Process Clause that those requirements are to be applied through the Due Process Clauses of the Fifth and Fourteenth Amendments.

In *Marks v. United States*, 430 U.S. 188 (1977), this Court held that a substantive change in obscenity standards made by this Court could not be applied to a defendant retroactively, under the Due Process Clause of the Fifth Amendment, stating at pages 191-192 that while the Ex Post Facto Clause applied only to the powers of legislatures, the concept

<sup>13</sup> See *Weaver v. Graham*, 450 U.S. 24, 30-31 (1981); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987).

of fair warning embodied in it was fundamental to our concept of constitutional liberty.

In *Bouie v. Columbia*, 378 U.S. 347 (1964), this Court applied the same reasoning to invalidate a State law conviction under an expanded interpretation of punishable conduct by the California Supreme Court, as violating the Due Process Clause of the Fourteenth Amendment.<sup>14</sup>

The Ex Post Facto Clauses have been stated to apply only to the imposition of punishment [*United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13 (1977); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798)]. It is submitted that the punishment imposed by punitive damages is sufficient to require the application through the Due Process Clause of the Ex Post Facto Clause principles stated in the *Marks* and *Bouie* cases, above, and *Weaver v. Graham*, 450 U.S. 24, 30-32 (1981) and *Calder v. Bull*, above.

Additionally, the Ex Post Facto Clauses have not been limited in application to criminal prosecutions. In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138-139 (1810) the Ex Post Facto Clause was applied in a case involving vested property rights; and *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 327-328 (1867) and *Ex Parte Garland*, 71 U.S. (4 Wall) 333, 377-378-(1867), involved, in effect, license revocation proceedings for failure to take an oath following the Civil War, which was held to be punishment. In *Burgess v. Salmon*, 97 U.S. 381, 385 (1878), a civil suit to collect a duty imposed by law after the sale of the item was completed, this Court stated that "ex post facto effect cannot be evaded by giving civil form to that which is essentially criminal."

<sup>14</sup> See also *Edtor v. Tacoma*, 228 U.S. 148, 155-156 (1913), Fourteenth Amendment Due Process violated by State statute repealing a vested right to compensation; *Coombes v. Getz*, 285 U.S. 434 (1932), Fourteenth Amendment Due Process violated by change in a State constitution repealing liability of defendants during the course of litigation.

The concerns of the Ex Post Facto Clauses apply directly to punitive damages awards. No fair warning is given of the amount of punishment. All determinations of punishment by punitive damages awards are after the fact and adverse to the defendant, except in those cases in which legislatures have previously acted to limit punitive damages awards [see e.g. Pet. Reply Cert. App. F].

Unless limits are set on punitive damages awards prior to commission of the punishable acts, arbitrary, selective punishment, at the whim of the particular jury or court, becomes the rule, giving free reign to bias and prejudice.<sup>15</sup>

This is contrary to all of the fundamental principles of fairness and notice embodied in the Due Process and Ex Post Facto Clauses.<sup>16</sup>

<sup>15</sup> Judges may impose punishment only to the extent the law has authorized prior to commission of the acts for which punishment is to be imposed [*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987)].

Prior to the adoption of penal codes by the states, crimes were those defined by the received common law of England. [Pound, *Criminal Justice In America*, pages 106-121 (1951); Rich, *Law And The Administration Of Justice*, pages 58-59 (1975); Wharton, *Criminal Law*, § 9 (1978); Campbell, *Law Of Sentencing*, §§ 1, 2 (1978)]. The punishment for those crimes was fixed and established by the common law, and judges were required to sentence in accord therewith although greater discretion was allowed for misdemeanors [Tomas, *The Penal Equation*, p. 3 (1978)]. Also, by the Eighteenth Century, England had adopted a penal code [Campbell, *Law Of Sentencing*, § 2 (1978)].

In states permitting jury sentencing, juries must also sentence within prescribed limits [See *Suits v. State*, 507 P.2d 1261 (Okla.Crim. 1973)].

<sup>16</sup> Fair notice is one of the bases of the Ex Post Facto Clauses. See *Miller v. Florida*, 482 U.S. 423 (1987), wherein this Court explained the reasons for inclusion of the Ex Post Facto Clauses in the Constitution as follows, at pages 425-430:

"... [T]he reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legis-

(continued)

It is a fundamental tenet of this society that such arbitrary power is not given to any branch of government, or its instrumentalities. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), an ordinance regulating laundries was challenged as violating the Equal Protection rights of Yick Wo, because, among other reasons, the ordinance was administered in a way to apply only to Chinese laundries. This Court held the ordinance to violate the Equal Protection Clause, stating, at pages 369-70:

*"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power...."* (Emphasis added.)

It is submitted that application of these principles to the award of punitive damages in this case requires that the award be vacated, with an opinion that no such awards can be made in the absence of prior governmental action establishing the range of permitted punishment for defined, forbidden conduct.

While it is recognized that the United States Constitution does not mandate separation of powers in state governments [see e.g. *Hughes v. Superior Court Of California*, 339 U.S. 460, 467 (1950)], and therefore, state courts could theoretically announce such rules prospectively where state

(fn. continued)

lation. . . . [and] that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' . . . Thus, almost from the outset, we have recognized that central to the ex post facto prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.' *Weaver*, 450 U.S., at 30, 67 L.Ed 2d 17, 101 S.Ct. 960."

constitutions permit,<sup>17</sup> it is submitted that the prescription of punishment and the definition of punishable conduct are appropriately legislative functions.<sup>18</sup>

At the federal level the determination of the punishment to be imposed for proscribed acts is an exclusive legislative function [*United States v. Hudson And Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *United States v. Eaton*, 144 U.S. 677, 687-688 (1892); *Gore v. United States*, 357 U.S. 386, 393 (1958); *see also Livingston v. State*, 419 So.2d 270 (Ala. Cr. App. 1982, applying Alabama law)].

In *Gore v. United States*, above, this Court stated, at page 393:

"In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy."

The legislature's duty is satisfied by establishing a range of permissible punishment for the particular offense [*United States v. Batchelder*, 442 U.S. 114, 126 (1979)], prior to the commission of the punishable act by the defendant [*Miller v. Florida*, 482 U.S. 423, 435-436 (1987)].

The absence of legislative or court action in Alabama to perform the balancing and weighing of competing choices to set the range of permitted punishment by way of punitive damages prior to the acts involved, placed purely arbitrary power in the jury and the reviewing courts, to set punishment after the fact.

This, it is submitted, violates the fundamental fairness requirement of the Due Process Clause of the Fourteenth Amendment.

The punitive damages award below should therefore be vacated.

**II. ALABAMA LAW VIOLATED PACIFIC MUTUAL'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, BY ALLOWING PUNITIVE DAMAGES TO BE AWARDED AGAINST IT UNDER A RESPONDEAT SUPERIOR THEORY**

A punishment sanction was imposed upon Pacific Mutual for acts of Mr. Ruffin, in pocketing premiums on Union Fidelity medical insurance policies. The jury may have found that Mr. Lupia had knowledge that billings and notices were being sent to Mr. Ruffin care of Mr. Lupia at the Pacific Mutual Agency office. Both were licensed with Union Fidelity. No evidence showed that Mr. Lupia was aware that Mr. Ruffin was collecting premiums contrary to his contract.

No evidence showed that Pacific Mutual's home office received any notice of any alleged similar prior activity by Mr. Ruffin before the actions in this case, or that Pacific Mutual had any notice of the actions complained of in this suit prior to the filing of the complaint.

No evidence showed any authorization for or ratification of this conduct. In fact, Pacific Mutual's contract with Mr. Ruffin forbade him from collecting any premiums other than the initial premium to be submitted with an application.

Pacific Mutual was therefore punished for unauthorized, unratified actions of one, or possibly two of its agents for acts they performed while acting on behalf of another company, Union Fidelity. The collecting of premiums was

<sup>17</sup> Clark, *Handbook of Criminal Law*, (1st Ed. 1984) p. 3.

<sup>18</sup> See discussion in Jeffries, *Legality And Vagueness, And The Construction Of Penal Statutes*, 71 Va.L.Rev. 189, 190-195 (1985).

forbidden, and stealing them cannot under any circumstances be deemed to be within any authority of an agent.

When punitive damages were imposed on Pacific Mutual on a *respondeat superior* basis, the focus for determination of the amount of the damages shifted from Mr. Ruffin to Pacific Mutual. It is self-evident that the jury would not have imposed a fine of over one million dollars on Mr. Ruffin. This factor contributed greatly to the fundamental unfairness, excessiveness and disproportionality of the fine imposed in this case, even though no wealth evidence was admitted.

**A. The Punitive Damages Award Herein Violated Due Process By Imposing Punishment For Conduct Not Authorized Or Ratified, And Not Performed To Benefit The Principal.**

In the law which has developed regarding the liability of corporations for criminal acts of agents, the following rules appear:

1. Legislatures have the authority to impose absolute liability on corporations for acts of agents, in public welfare crimes, unrelated to knowledge or any other mental element, where the forbidden act or omission is so injurious to the public interest that no mental element is required [*United States v. Balint*, 258 U.S. 250 (1922); *Morissette v. United States*, 342 U.S. 246 (1952)].

2. Legislatures may, consistently with Due Process, impute the mental element of the agent to the corporation for purposes of criminal liability under regulatory statutes, where the agent is acting to benefit the corporation and further its business [*New York Central And Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909); *See United States v. A & P Trucking Co.*, 358 U.S. 121 (1958); *Standard Oil Of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958)].

No such legislative programs are involved in this case.

Virtually all of the cases upholding corporate criminal liability involve statutes regulating business activity. In ALI Model Penal Code, Comment On § 207, Tentative Draft No. 4 (1956), it is stated, at page 149:

"... [T]he great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy."

Outside of the regulatory area, where fines are imposed to achieve compliance under circumstances where it is in the corporation's financial interest to evade the statutory requirements, there would appear little justification for allowing punishment of corporations for the punishable mental state of agents performing unauthorized, unratified acts within the scope of actual or apparent authority.<sup>19</sup>

That punishment falls ultimately upon innocent shareholders, or here, upon Pacific Mutual's other policyholders, who own the company.

However, assuming the viability of such awards, it is submitted that the punitive damages award here violated Due Process by imputing acts of Mr. Ruffin to Pacific Mutual which were not performed to benefit, or with any intent of benefiting, Pacific Mutual, and therefore are beyond the point of fundamental fairness.

As noted above, virtually all of the cases holding corporations to criminal liability for acts of agents outside of the absolute liability, public welfare offense area, have been

<sup>19</sup> Canfield, *Corporate Responsibility For Crime*, 14 Colum.L.Rev. 469 (1914); Francis, *Criminal Responsibility Of Corporations*, 18 Ill.L.Rev. 305 (1924); Mueller, *Mens Rea And The Corporation*, 19 U.Pitts.L.Rev. 21 (1957); Note, *Corporate Criminal Liability For Acts In Violation Of Company Policy*, 50 Geo. L.J. 547 (1962); Perkins, *Criminal Law*, (2d Ed. 1969).

regulatory statutes, where the legislatures have expressed the intent that the mental element of the agents be imputed to the corporation. Courts, in enforcing this legislative intent, have drawn the line for the imposition of such liability at the point where the agent cannot be said to be acting to benefit, or for the purpose of benefiting, the corporation. [See e.g. *New York Central And Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909); *Standard Oil Of Texas v. United States*, 307 F.2d 120, 128 (5th Cir. 1962); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958).]

It is submitted that the line so established is also the line beyond which Due Process does not allow the actions or intent of the agent to be imputed to the corporation for purposes of imposing punishment.

In *New York Central And Hudson River R.R. Co. v. United States*, above, which established the basic principles of corporate criminal liability, this Court emphasized that liability, civil and criminal, is imposed on corporations "because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal." [212 U.S. at 493.]

Where these factors are absent, such liability is not imposed. In *Standard Oil Of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962), employees of Standard Oil violated the Connally "Hot Oil" Act by diverting oil from Standard's wells and falsely recording it as having been produced by eligible wells of a third party. Standard Oil was convicted of "knowingly" falsely recording the production. The Circuit Court, in reversing the conviction, stated at page 128:

"... Thus the taking in or paying out of money by a bank teller, while certainly one of his regular functions, would hardly cast the corporation for criminal liability if in such 'handling' the faithless employee was pocketing the funds as an embezzler or handing them over to a confederate under some ruse."

This example is exactly the basis upon which Pacific Mutual was punished. The Court characterized such liability as follows, at page 129:

"... [T]o say that acts done by servants actuated by such evil and specifically unlawful motives were the acts of the very corporations thus sought to be cheated or implicated in practices known to be in serious violation of law and, moreover, to impute not only accountability but 'knowledge' of such acts to the corporations, would be to disregard every accepted notion of respondeat superior."

The Court then stated, as the governing rule, at page 129:

"[T]he corporation does not acquire that knowledge or possess the requisite 'state of mind essential for responsibility,' through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer."

It is submitted that the rule stated above is required by Due Process. A defendant cannot be punished for an act or omission so far removed from culpability that punishment cannot be justified [*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982); *Robinson v. California*, 370 U.S. 660, 667 (1962); *Thompson v. City Of Louisville*, 362 U.S. 199 (1960)].

Mr. Ruffin's actions were taken to benefit himself, while dealing with the medical insurance policy issued by another company. The trial court described a fraud justifying the punitive damages award as, "... Ruffin knowingly and intentionally committed fraud by collecting insurance premiums on canceled policies and keeping the premiums for himself." [Pet. Reply Cert. App. A12.] In his deposition testimony, Mr. Ruffin stated that he was collecting the premiums after cancellation of the Union Fidelity policy for submission with applications to other companies. Therefore,

he cannot have been acting for, or with intent to benefit, Pacific Mutual.

Punishment of Pacific Mutual for Mr. Ruffin's apparent theft of the premiums from Pacific Mutual, assuming *arguendo*, that Pacific Mutual could under any circumstances be considered the principal as to such act, violated the concept of fundamental fairness embodied in Due Process.

### III. THE AMOUNT OF THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS EXCESSIVE, IN VIOLATION OF PACIFIC MUTUAL'S DUE PROCESS RIGHT TO BE FREE OF GROSSLY EXCESSIVE, DISPROPORTIONATE DAMAGES AWARDS

If this Court accepts the analysis set forth in above, regarding the standardless jury discretion to punish in this case, the question of the excessiveness of this award, or future punitive damages awards, would not be involved. The issue would, rather, be the validity, if challenged, of state legislative acts providing for punitive damages.

Here, the actual economic damage sought by all Respondents was \$3,923.94 [Pet. Reply Cert. App. A21-22]. Mrs. Haslip sought a combination of economic and emotional distress damages of \$200,000 [*Id.*, A22-23], and punitive damages of \$3,000,000 [*Id.*, A23]. The punitive damages award as to Mrs. Haslip alone, assuming the jury awarded the full \$200,000 in non-punitive damages, would be \$800,000. Respondents' counsel presented the case to the Alabama Supreme Court as involving a punitive damages award of \$1,040,000 [*Id.*, C1].

A number of decisions of this Court have addressed the issue of whether or not a particular penalty constituted punishment, and the Constitutional implications of such a finding [*Calder v. Bull*, 3 U.S. (3 Dall.) 286 (1798); *United States ex. rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Trop v.*

*Dulles*, 356 U.S. 86 (1958); *United States v. Ward*, 448 U.S. 242 (1980) and *United States v. Halper*, 490 U.S. \_\_\_, 109 S.Ct. 1892, (1989)].

The punishment purpose of the punitive damages award here is express. The jury was instructed that punitive damages were not to be awarded for compensation for injury, but for punishment.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. \_\_\_, 109 S.Ct. 2909 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating, at page 2923:

"Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable,' *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); see also *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Missouri Pacific Railway Co. v. Barnes*, 115 U.S. 512, 522-23 (1885)."

The concern for proportionality of punishment thus expressed is a common theme under the Constitution [See *Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Plyler v. Doe*, 457 U.S. 202 (1982); and *Solem v. Helm*, 463 U.S. 277 (1983)]. Due Process, Equal Protection and the Eighth Amendment all share this concern.

The general rule regarding whether a punishment sanction is excessive appears to be that the punishment must not be grossly out of proportion to the severity of the offense [*Id.*].

While the three part test for excessiveness and disproportionality set forth in *Solem v. Helm*, above, was applied in an Eighth Amendment excessiveness context, it is submitted that the same analysis is appropriate for consideration of excessiveness under a Due Process analysis. In *Solem*, that test was stated as follows, at pages 290-292:

"First, we look to the gravity of the offense and the harshness of the penalty. . . .

"Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . .

"Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."

Applying the *Solem* test here, one can scarcely imagine a criminal statute being upheld which imposed a million dollar fine for vicarious liability of a principal not shown to have had a *mens rea*.

The disproportion between the fine assessed in this case against an innocent corporation for the unauthorized, unratified fraud of a sales agent, and the fines established by the Alabama legislature for serious offenses against the public is so great that such fines are excessive in violation of constitutional protections. [Compare the recent punitive damages awards in Appendix A to the statutory criminal fines in Appendix B. They are shockingly disproportionate.] See Ala. Code §§ 13A-4-3, 13A-5-12 and 13A-9-41 (1975). Comparison of the award in this case with punitive damages established by the Alabama Legislature where it has addressed the issue of the appropriate amount of civil punishment with respect to specific conduct shows a similar disproportionality [see Pet. Reply Cert. App. F].

Similarly, no criminal fine in virtually any state remotely approaches the amount of the fine imposed upon Pacific Mutual here. This penalty award should therefore fail the second *Solem* test.

With respect to the third *Solem* test, it is virtually impossible to make any comparison of the fine imposed in this case with fines imposed by other jurisdictions for the same offense. In the majority of jurisdictions, punitive damages are not allowed against a principal upon a *respondeat superior* basis, where no ratification or authorization is proven and the agent is not in a managerial capacity [Pet. Reply App. D]. Further, the arbitrary and unpredictable nature of punitive damages in general makes comparisons an exercise in futility, other than to show the arbitrary nature of the doctrine. For example, in a products liability case, *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689 (1967), punitive damages for falsifying drug test dates, resulting in blindness, remitted to \$250,000 were upheld, while in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), a case involving injury from the same drug, against the same manufacturer, the court set aside the punitive damages award entirely.

Under any test of excessiveness, however, it is submitted that the punishment imposed upon Pacific Mutual on an apparent authority basis was excessive. The award in this case exemplifies the concern expressed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1971) regarding punitive damage awards in wholly unpredictable amounts bearing no necessary relation to actual harm caused.

Even an \$800,000 punishment sanction under the facts of this case must be deemed to be grossly disproportionate to any fault on the part of Pacific Mutual, and therefore, to violate the Due Process Clause of the Fourteenth Amendment.

**IV. THE SUIT BELOW, ALTHOUGH NOMINALLY CIVIL, MUST BE CONSIDERED CRIMINAL IN NATURE AS TO THE PUNITIVE DAMAGES AWARDED THEREIN, ENTITLING PACIFIC MUTUAL TO PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

As noted above, the punitive damages award here was imposed as punishment, and served the same function as a criminal fine.

In an early analysis of punitive damages awards, Professor Willis wrote:<sup>20</sup>

"... No hypothesis, however ingenious, can cloud the mind to the fact that exemplary damages put a man in jeopardy once, and if he is also punished criminally for the same offense, he is 'twice put in jeopardy.' Again, when assessed exemplary damages, the accused is really punished for a criminal offense without the safeguards of a criminal trial.... The procedure and principles of criminal law are disregarded, the rules of damages are forgotten, and the machinery of justice is used for the avowed purpose of giving the plaintiff that to which he has no shadow of right.... The doctrine is altogether inconsistent with sound legal principles and it is unfortunate that it ever found lodgment in the law, and we look with admiration upon any court brave enough to disown and abandon it."

Professor Willis' comments sum up Pacific Mutual's experience in this case.

The rights of Pacific Mutual under the Fourteenth Amendment to certain trial procedural protections incorporated from the Fifth Amendment were violated by the trial procedures below.

Where punishment is imposed in actions initiated by the government, certain Fifth and Sixth Amendment protections have been required [*United States v. Halper*, 490 U.S. \_\_\_, 109 S.Ct. 1892 (1989); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Trop v. Dulles*, 356 U.S. 86 (1958). See also *United States ex rel Marcus v. Hess*, 317 U.S. 537 (1943)].

Here, the enforcement of the State's interest in punishment and deterrence was given over to private attorneys general [*In Re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980), cert. denied, 449 U.S. 976 (1980)]. The fact that the punishment is imposed in a private action should not affect the rights of the defendant made subject to possible severe punishment [See *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966); *Burgess v. Salmon*, 97 U.S. 381, 385 (1878); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 326-27 (1867)]. To the defendant facing possible stigma and severe financial penalties, the difference between an action seeking a civil penalty and one seeking a criminal penalty is small.

Further, the sheer magnitude of present punitive damages awards [see e.g. Appendix A, setting forth the astonishing number and size of recent Alabama punitive damages awards, and the similar appendix to the *amicus curiae* brief for the Association for California Tort Reform] requires that rigorous procedural fairness be imposed in these trials.

It is submitted that, as relevant in this case, the procedural protections required are (i) a beyond a reasonable doubt burden of proof, (ii) unanimous jury, (iii) an upper limit on

<sup>20</sup> Willis, *Measure of Damages When Property Is Wrongfully Taken By An Individual*, 22 Harv.L.Rev. 419, 421-422 (1909).

the punishment, and (iv) trial of issues of underlying liability prior to trial of issues relating to liability for and amount of punitive damages.

Under the test of procedural Due Process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), it is submitted that each of the above is required. In *Mathews*, this Court set forth the analysis for determining the requirements of procedural Due Process in particular cases, stating, at page 335:

"...[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Testing the trial procedures in this case by the three *Mathews* factors shows that each of the following additional protections were required.

**A. Beyond A Reasonable Doubt Standard Of Proof.**

The trial court rejected Pacific Mutual's requested jury instruction for a beyond a reasonable doubt burden of proof.

Given the close analogy of punitive damages to criminal fines, it is submitted that this enhanced burden of proof is required by Due Process. [See *In Re Winship*, 397 U.S. 358, 364 (1970)]. Colorado has imposed a beyond a reasonable burden of proof by statute [Colo. Rev. Stat. § 13-25-127(2) (Supp. 1986)].

Other states have by statute or court decision required a clear and convincing evidence test. In *Travelers Indemnity*

*Co. v. Armstrong*, 442 N.E.2d 349 (Ind. S.Ct. 1982), the Court adopted that standard of proof, stating, at page 363:

"A rule that would permit an award of punitive damages upon inferences permissibly drawn from evidence of no greater persuasive value than that required to uphold a finding of the breach of contract — which may be nothing more than a refusal to pay the amount demanded and subsequently found to be owing — injects such risks into refusing and defending against questionable claims as to render them, in essence, nondisputable. The public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes...." (Emphasis added.)

It is submitted that the reasoning of the Indiana Court is sound, but that a clear and convincing standard of proof, while an improvement, is not sufficient in these cases. The risks of erroneous fact finding and jury bias are too high in cases where civil fines can be awarded which far exceed any conceivable criminal fine. Such risk requires the enhanced standard of proof to provide the necessary confidence in the correctness of the fact finding involved. [See *Addington v. Texas*, 441 U.S. 418, 423 (1979)].

**B. Unanimous Jury.**

Alabama required a unanimous jury in this case.

**C. Upper Limit On Awards.**

The necessity of such a limit has been discussed above. Under the test in *Mathews v. Eldridge*, above, it is submitted that such a limit is procedurally required. Limits fixed to match conduct would alleviate much of the problem associated with these awards. The fact that Alabama and other states have limited punitive damages in many areas demonstrates that no governmental interest would be adversely affected.

**D. Separation In The Order Of Trial Of Liability Issues From Punitive Damages Issues.**

Again under the test in *Mathews v. Eldridge*, above, it is submitted that bifurcation is required of the order of trial, to try the issues of underlying liability before issues related to punitive damages and the amount of such an award.

If such bifurcation is not allowed, the defendant is put at risk of erroneous findings of fact on liability issues. Here, the jury below could not help but be influenced in determining whether or not Pacific Mutual should be held for Mr. Ruffin's fraud by evidence and argument relating to plaintiffs' request for emotional distress and punitive damages. This unnecessary risk can easily be avoided by controlling the order of proof and submitting the question of underlying liability to the jury prior to continuing the trial, if necessary, as to punitive damages issues.

**V. ALABAMA PUNITIVE DAMAGES LAW IS DISCRIMINATORY IN VIOLATION OF THE EQUAL PROTECTION CLAUSE, BY ENCOURAGING DISPROPORTIONATE PUNISHMENT, WITHOUT RATIONAL BASIS.**

The Fifth, Eighth and Fourteenth Amendments, and the Ex Post Facto Clauses, all embody a concern for even-handed application of the law to all. [*Plyler v. Doe*, 457 U.S. 202 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *How Ah Kow v. Nunan*, 12 Fed.Cas. 252 (Case 6, 546, 1877); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).]

The Equal Protection cases generally deal with classifications which discriminate against groups, protecting against religious, racial, ethnic and gender bias, among others. Classifications which are arbitrary or capricious are

invalid. [*Walters v. St. Louis*, 347 U.S. 231 (1954); *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*, 299 U.S. 183 (1936).]

Under Alabama law, and punitive damages law generally, each jury or court is allowed to classify and discriminate in deciding who among those "guilty" of substantially the same conduct should be punished, and how severely to punish those chosen for punishment.

The effects of this unpredictable discretion is to allow juries to punish the unpopular and indulge bias and prejudice [*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 250 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-84 (1971) (Marshall, J., dissenting)] and to inhibit access to the courts for the resolution of disputes [*Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 363 (Ind. S.Ct. 1982)].

An example of this differential punishment in Alabama is discussed above, in Section I.B, wherein Justice Houston noted the great disparity in awards for substantially the same conduct made by two different juries which were identically instructed. It is submitted that the award of punitive damages here, and the Alabama law under which it was made, violated both the Due Process and Equal Protection rights of Pacific Mutual. The award should be vacated.

**VI. THE CONSTITUTIONAL DEFECTS IN THE AWARD OF PUNITIVE DAMAGES AGAINST PACIFIC MUTUAL IN THIS CASE WERE NOT CURED BY JUDICIAL REVIEW AND THE POTENTIAL FOR A REMITTITUR**

The Alabama Supreme Court stated at page 11 of its opinion [Pet. App. B13] that review of the punitive damages award by the trial court under the procedures established in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986)

further established that the Due Process Clause had not been violated. In fact no such review occurred.

In *Hammond*, the Alabama Supreme Court established seven factors to be considered by the trial court in reviewing a challenged award of punitive damages. They are:

- (i) whether there is a reasonable relationship between the punitive damages and the harm done by the defendant;
- (ii) the reprehensibility of defendant's conduct;
- (iii) the profit to defendant from such conduct;
- (iv) the wealth of the defendant;
- (v) the costs of litigation;
- (vi) whether criminal sanctions have been imposed; and
- (vii) whether other civil awards have been made against defendant for the same conduct.

These factors are largely unreviewable, and merely transfer discretion to the reviewing court. For example, the "reasonable relationship" test has proved to be meaningless because virtually any ratio of punitive to actual damages can be and has been held to be "reasonable." These factors amount to no more than the "gentle test of excessiveness," particularly given the extraordinary deference given to the jury decisions in these cases. At most, use of the language of these criteria merely disguise the true bases of the court's decisions, which are subjective value judgments.

Where, as here, there were no meaningful standards to guide the jury, trial court and appellate review is meaningless. Courts, no more than juries, can be given unbridled discretion to determine the amount of punishment after the defendant has acted. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Marks v. United States*, 430 U.S. 188, 191-192 (1977); *Bouie v. Columbia*, 378 U.S. 347 (1964); the vice of vague standards is that no meaningful review can be made [*Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)].

The trial court review in this case illustrates this fact. That court did not conduct a *Hammond* hearing, and the reasons stated by the trial court for upholding the award were not *Hammond* factors. The trial court's reasons were stated as follows [Pet. App. A15]:

"Although the award is for a great amount of money, it is the considered opinion of this Court that it is not excessive as a matter of law, though this Court would in all likelihood have rendered a lesser amount; nor is the verdict based upon bias, passion, corruption, or other improper motive. The jury seems to fashioned [sic] their awards in proportion to the damage done each plaintiff; awarding the most damaged plaintiff, Cleopatra Haslip, the larger award and the least damaged plaintiff, Eddie Hargrove, the least award.

"The jury was composed of male and female, white and black and in the opinion of the Court, acted conscientiously throughout the trial."

These stated reasons demonstrate only the subjective reaction of the trial judge, tempered by deference to the jury verdict. The resulting judgment was affirmed by the Alabama Supreme Court, upon a presumption of the correctness of the verdict.

Even if a review utilizing *Hammond* criteria had been given, it would not have cured the defects.

Justice Maddox, in his dissent below [Pet. App. B16] stated his view of these criteria as follows:

"While I applaud the procedure this Court has adopted to review and revise the jury's decision based upon its 'standardless discretion,' I cannot believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions." [Footnote omitted.]

It is submitted that judicial review does not and cannot cure the constitutional defects in the punitive damages award in this case. A procedure for review of a decision made under an unconstitutional law does not and cannot cure the unconstitutionality of the law. [*Baggett v. Bullitt*, 377 U.S. 360, 373 (1964); *See Furman v. Georgia*, 408 U.S. 238 (1972); *cf. Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6, 7-11 (1970).]

In *Baggett v. Bullitt*, 377 U.S. 360 (1964), this Court stated, at p. 373:

"Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."

These defects are worsened because, in Alabama, as in most states, extraordinary deference is given to the jury's decision as to punitive damages, and a jury's punitive damage award will only be disturbed if it is, in the judgment of the reviewing court, so excessive as to show that it must have been the product of bias, passion, prejudice, corruption or other improper motive. [*Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)]. This deference is enhanced in Alabama because of that state's interpretation of the provision in the Alabama Constitution, confirming a right to jury trial.<sup>21</sup>

...

This standard of review leaves such a broad field for unfettered jury discretion that it cannot cure underlying defects, and as noted above, merely transfers standardless discretion to the reviewing courts.

In *2-D's Logging, Inc. v. Weyerhauser Co.*, 632 P.2d 1319 (Or. 1981), the appellate court made note of this problem, stating at page 1326:

"[Punitive damages doctrines have] resulted in a perplexing and contorted mode of judicial review . . . which, in reality, is an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts. . . . At least in cases where there is no specific statutory authorization for their award, the imposition of punitive damages involves a policy or value judgment."

Decisions by reviewing courts in these cases are equally as invalid as the original jury awards, because they are made on a standardless basis.

The *Hammond* factors are equally deficient in content as standards for juries in setting awards as for reviewing courts in overseeing such awards, because (i) these "standards" are insufficient as guides to determine the amount of punishment (only two of the factors are directed to that issue), and (ii) no range of permissible punishment would have been set in advance of Pacific Mutual's conduct, to give fair warning of the consequences of committing whatever wrongful acts were involved. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Bouie v. Columbia*, 378 U.S. 347 (1964)]. Decisions by either a jury or a court would still be made upon the basis of the subjective reactions of the jurors or judges, with no effective or reviewable limit on their discretion as to the amount of the award. Such decisions are necessarily arbitrary, and therefore invalid. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984); *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1886)]. Review of such awards would still necessarily be by the "gentle test of excessiveness."

<sup>21</sup> See the concurring opinion of Houston, J., in *Charter Hospital of Mobile, Inc. v. Weinberg*, 1990 Ala. Lexis 17, to be published at 558 So.2d 909 (Jan. 12, 1990), in which the effect of this provision on judicial review of jury verdicts appears to contribute to his view that review under *Hammond* procedures cannot cure the constitutional defects in Alabama punitive damages law.

Discretion unguided by any objective, meaningful standards would still reside in the jury, and be transferred to reviewing courts upon motion or appeal.

Justice Houston has now joined Justices Maddox and Steagall in concluding that Alabama review procedures do not cure the Due Process defects at the jury level. In *Charter Hospital of Mobile v. Weinberg*, 1990 Alabama Lexis 17 (Jan. 12, 1990), Justice Houston<sup>22</sup> stated that he had believed that post trial court review would pass constitutional muster, but that because of the deference to jury verdicts required by the Alabama Constitution he had to conclude such review did not cure the defects. Justice Houston stated, at 1990 Ala. Lexis 17, pages 22-23:

"Setting standards for post-trial review of a jury's verdict . . . does not comply with this constitutional provision, since the standard by which the jury is to gauge the amount of punitive damages, if any, that it is to award is incomprehensibly vague and unintelligible."

It is submitted that under the three-part test of procedural Due Process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the provision for remittitur by reviewing trial and appellate courts does not satisfy the requirements of Due Process for adequate limits on jury discretion.

The concern expressed by this Court, that there is a lack of objective standards limiting the jury's imposition of punishment, and juries are left free to render awards without any necessary relationship to actual harm, cannot be met by the generalized, subjective and highly judgmental factors suggested by the Alabama Supreme Court.

## CONCLUSION

Punitive damages law, as applied in this case, and as presently applied generally, is overwhelmingly lacking in fundamental fairness. The law gives no fair notice of the consequences of prohibited conduct because of the vague and contentless criteria upon which the award was founded. The jury was sent to deliberate with no meaningful standards to guide it as to the amount of punitive damages awardable. This unbridled discretion leads to arbitrary, discriminatory and unpredictable awards.

The jury was told only to consider the "character and degree of the wrong," and the "necessity of preventing similar wrongs." As recognized by Justice Houston, these criteria are hopelessly vague and incomprehensible as standards for a jury to use in assessing punitive damages.

These instructions left the jury free (i) to give reign to biases and prejudices and to punish selectively; (ii) to allow others "guilty" of equally "reprehensible" conduct to go unpunished; (iii) to punish unpopular and target defendants; and (iv) to render awards with no necessary relationship to actual harm caused.

If the award had been made initially by the trial court utilizing the same criteria contained in the pattern jury instruction, the award would be equally invalid. Therefore, trial court review did not, and could not cure the defects at the jury level. Similarly, appellate review based upon these criteria, or the *Hammond* criteria, amounted to no more than the "gentle test of excessiveness." A determination of excessiveness in these circumstances means only that the visceral reactions of the reviewing justices were that the award either was or was not too large [See *Rummel v. Estelle*, 445 U.S. 263, 275 (1980); *Solem v. Helm*, 463 U.S. 277, 308 (1983), Burger, C.J., dissenting].

<sup>22</sup> Justice Houston recommended in his concurrence that juries be instructed with factors essentially the same as the *Hammond* factors. This would not cure the Constitutional defects for the reasons stated in the text.

Without objective limits on the amount of punitive damages which may be awarded for specified conduct, no fair warning of the consequences of any particular conduct is given, and the result is punishment on an *ad hoc*, after-the-fact basis. Such punishment violates the concerns for fundamental fairness and fair warning embodied in the Due Process Clause of the Fourteenth Amendment.

If the Alabama legislature had enacted a statute making conduct of the class of Pacific Mutual's involvement with Mr. Ruffin subject to civil penalty of \$1,000,000, after Mr. Ruffin's fraud, both Due Process and Ex Post Facto Clauses concerns would invalidate application thereof to Pacific Mutual. But that is what was allowed through the jury and reviewing court procedures in Alabama in this case.

This lack of fundamental fairness was exacerbated by the trial procedure employed, which allowed (i) trial of the punitive damages claim concurrently with the agency issues, thereby tainting the fact finding as to agency; and (ii) the award of punitive damages to be made upon a preponderance of the evidence basis, so that a fine in excess of \$1,000,000 could be imposed on the slightest tipping of the balance in favor of Respondents.

Although Alabama did not allow wealth evidence, the amount of the award was clearly based upon the jury's perception of Pacific Mutual's ability to pay, which has no relationship to deterrence or fault, and is a punishment of status [*See Williams v. Illinois*, 399 U.S. 235 (1970)].

Given Pacific Mutual's tenuous connection to the punishable conduct of Mr. Ruffin for which it was punished on a *respondeat superior* basis, Due Process was also violated by such an award. Even applying the rules for imposing criminal liability on corporations for violations of statutory offenses, Pacific Mutual would not validly be subject to punishment. Such liability depends upon the agent acting to benefit, or with intent to benefit, the corporation. No such intent could conceivably be found in Mr. Ruffin's pocketing

of the premiums on the Union Fidelity policy. Punishing Pacific Mutual under these circumstances was akin to punishing a bank because a teller embezzled funds.

No statute existed in Alabama making Pacific Mutual's conduct punishable, and setting the range of permitted punishment. No received common law supplied these deficiencies. The jury was allowed, in fact instructed, to view the evidence through the prism of its biases, and to impose or withhold punishment in any amount as it chose, limited only by its perception of Pacific Mutual's assets. Due Process requires more.

It is submitted that the award of punitive damages should be vacated.

Dated: June 1, 1990

Respectfully submitted,

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**APPENDIX A**

PARTIAL LIST OF ALABAMA JURY VERDICTS  
AWARDING PUNITIVE DAMAGES  
OF \$500,000 OR MORE  
FROM JANUARY 1, 1990 TO APRIL 30, 1990  
(\* indicates wrongful death case)  
1990

1. *Wilburn v. Luxaire, et al.* \$50,000,000\*  
Mobile County Circuit Court  
CV-88-147 *et seq.* (April, 1990)  
\$50,000,000 punitive damages, plus  
previous settlement of \$11,500,000  
for wrongful death of five-member  
family resulting from alleged negli-  
gence involving heating unit.
2. *Sue Chumney as Administrator* 3,000,000\*  
*of the Estate of Christopher E.*  
*Long, deceased v. Flowers Hospital*  
Houston County Circuit Court  
CV-87-587 (1990)  
Wrongful death of child.  
Settled post-trial.
3. *Tate v. P.P.G. Industries* 2,500,000\*  
U.S. District Court for the Southern  
District of Alabama (February 19, 1990)  
Punitive damages for wantonness in  
wrongful death case.
4. *Carter v. Old American* 1,400,000  
*Insurance Company*  
Lauderdale County Circuit Court  
(April, 1990) \$1,400,000 punitive  
damages for bad faith nonpayment of  
health insurance claim. See 544 So.2d  
917 (Ala. 1989) wherein summary  
judgment for the insurer was reversed.

5. *Burden v. Empire Fire & Marine Ins. Co.* \$ 1,400,000  
Lauderdale County Circuit Court CV-88-244 (March 2, 1990)  
Alleged bad faith for failing to settle uninsured motorist claim. \$400,000 awarded for compensatory damages and \$1,000,000 for punitive damages.  
Post-trial motions pending.

6. *American Employers Insurance Company v. Southern Seeding Services, Inc., et al.* 1,150,000  
U. S. District Court for the Northern District of Alabama CV 87-G-0294S  
Verdict awarding \$400,000 in compensatory damages and \$750,000 in punitive damages on February 22, 1990.  
Appeal filed 3/27/90.

7. *Braden v. Dorsey Motor Sales, Inc.* 1,000,000  
Autauga County Circuit Court (April 3, 1990) \$1,000,000 punitive damages, \$15,600 compensatory damages for alleged fraudulent misrepresentation by car dealer that a used car was "new."

8. *William Thornton v. Yamaha Motor Co., Ltd., et al.* 750,000\*  
Montgomery County Circuit Court CV-88-1639-TH (April 18, 1990)  
Wrongful death.  
No appeal pending.

**PARTIAL LIST OF ALABAMA JURY VERDICTS  
AWARDING PUNITIVE DAMAGES  
OF \$500,000 OR MORE  
FROM JANUARY 1, 1989 TO DECEMBER 31, 1989**  
(\* indicates wrongful death case)  
**1989**

1. *Braswell v. Conagra* \$13,150,000  
U.S. District Court for Middle District of Alabama (Southern Division)  
88-00741-T-S (November, 1989)  
Breach of contract and fraud.  
\$4,050,000 in compensatory damages and \$9,100,000 in punitive damages.  
Appeal pending.

2. *Sigafoose, v. Babson Brothers Co.* 10,000,000  
Baldwin County Circuit Court CV-86-573 (1989)  
\$10 million punitive damages for fraud involving \$21,000 compensatory claim.  
Settled post-trial.

3. *Robbins v. State Farm Mut. Auto. Ins. Co.* 5,000,000  
541 So.2d 477 (Ala. 1989)  
Macon County  
\$5 million punitive damages for bad faith and fraud involving \$700 disability claim. Remitted to \$500,000.  
Affirmed by Alabama Supreme Court.

4. *Thornton v. Knollwood Park Hospital* 5,000,000\*  
Mobile County Circuit Court CV-85-1275 (1989)  
Wrongful death.  
Settled on Appeal.

5. *Turner v. Alabama Power Company*      \$ 4,000,000\*  
Montgomery County Circuit Court  
CV-88-1700-PH (August 30, 1989)  
Wrongful death suit.  
Appeal pending.

6. *United Serv. Auto Ass'n. v. Wade*      3,500,000  
544 So.2d 906 (Ala. 1989)  
Walker County  
\$3.5 million nonjury punitive damages  
verdict for bad faith remitted to \$2.5  
million. Compensatory damages of  
\$166,795 plus \$21,962 on contract count.  
Appeal pending.

7. *Ford v. Colonial Mortgage Co.*      3,000,000  
Russell County Circuit Court  
CV-89-010 (November 1989)  
Punitive damages for fraudulent breach  
of residential home loan commitment.  
Appeal pending.

8. *Lindblom v. Intercontinental  
Life Ins. Co.*      3,000,000  
Jefferson County Circuit Court  
CV-86-7156 (1989)  
Bad faith & fraud involving \$10,000  
death benefit.  
Appeal pending.

9. *Olympia Spa v. Johnson*      3,000,000\*  
547 So.2d 80 (Ala. 1989)  
Mobile County  
Wrongful death.  
Affirmed by Alabama Supreme Court.

10. *Land & Associates, Inc. v. Simmons*      \$ 2,500,000  
[Ms.87-1313, December 22, 1989]  
\_\_\_\_ So.2d \_\_\_\_ (1989)  
Mobile County  
Fraud involving \$10,000 in life  
insurance proceeds.  
Affirmed by Alabama Supreme Court.

11. *Majid Jahandarfard, et al. v. Lomax  
Killough, et al.*      2,500,000\*  
Madison County Circuit Court  
CV88-1269P (November 8, 1989)  
Wrongful Death.  
Appeal pending.

12. *Pettus, Estate of v. Vari-Care*      2,500,000\*  
Mobile County Circuit Court  
CV-86-196 (June 20, 1989)  
Wrongful death.  
Appeal pending.

13. *Blackburn, et al. v. Altus Bank*      2,038,753  
Mobile County Circuit Court  
CV-88-2263 (November 30, 1989)  
Alleged fraud. Two plaintiffs.  
\$1,538,753 for one plaintiff, \$500,000  
for other plaintiff.  
Appeal pending.

14. *White, et al. v. Georgia Casualty  
Insurance Co.*      2,000,000  
Barbour County Circuit Court,  
Clayton Division  
CV-84-037 (June 28, 1989)  
Bad faith action.  
Appeal pending.

15. <i>Stoval, Estate of v. Montgomery Health Care, et al.</i>	\$ 2,000,000*
Montgomery County Circuit Court	
CV87-173-TH (1989)	
Wrongful death.	
16. <i>HealthAmerica, et al. v. Menton</i>	1,800,000
551 So.2d 235 (Ala. 1989)	
Mobile County	
Fraud involving \$2,400 claim	
for medical benefits.	
Affirmed by Alabama Supreme Court;	
Cert. denied by Supreme Court of	
United States.	
17. <i>Phillips v. United American Ins. Co.</i>	1,800,000
Etowah County Circuit Court	
CV-87-132JSS (June 2, 1989)	
Bad faith and fraud involving \$264	
unpaid balance on medical claim.	
Settled post-trial.	
18. <i>Turner v. Deutz-Allis Credit Corporation</i>	1,609,500
Barbour County, Clayton Division	
CV-85-043 (October 9, 1989)	
No post-trial relief. Appeal pending.	
19. <i>Beyer v. Beech Aircraft Corp.</i>	1,500,000*
Jefferson County Circuit Court	
CV-81-2120 (1989)	
Wrongful death.	

20. <i>Terry v. John Carner and Leisure American, Inc.</i>	\$ 1,500,000
Jefferson County Circuit Court	
CV 85-6777 (November 1, 1989)	
Fraud claim involving \$5,500	
actual damages.	
Settled prior to appeal.	
21. <i>Porter v. Hook</i>	1,300,000
554 So.2d 382 (Ala. 1989)	
Jackson County	
Action for breach of written contracts.	
Breach of unwritten joint venture	
agreement and fraud against cable	
television owner.	
Remitted to \$300,000 by trial court.	
Full verdict reinstated by Supreme	
Court of Alabama.	
22. <i>Central Alabama Electric Coop. v. Tapley</i>	1,000,000*
546 So.2d 371 (Ala. 1989)	
Tallapoosa County	
Wrongful death.	
Affirmed by Alabama Supreme Court.	
23. <i>Pacific Mutual Life Ins. Co. v. Haslip</i>	1,000,000
[Ms.87-842, Sept. 13, 1989]	
553 So.2d 537 (Ala. 1989)	
Fraud. Affirmed by Alabama	
Supreme Court.	
Cert. granted by Supreme Court	
of United States.	

24. *Carlis v. Ft. Deposit Motor Co., et al.* \$ 1,000,000  
Macon County Circuit Court  
CV-87-30 (April 19, 1989)  
Fraud involving sale of credit life  
insurance; approximately \$1,000  
compensatory damages.  
\$1,000,000 remitted to \$250,000.  
Appeal pending.

25. *Shelby County v. Bailey* 1,000,000\*  
545 So.2d 743 (Ala. 1989)  
Jefferson County  
Wrongful death - \$500,000 each  
for two deaths.  
Affirmed by Alabama Supreme Court.

26. *United American Ins. Co. v. Brumley* 1,000,000  
542 So.2d 1231 (Ala. 1989)  
Marion County  
Bad faith involving compensatory  
damages of \$5,000.  
Affirmed by Alabama Supreme Court.  
Rehearing denied.

27. *Kumar v. Lewis* 875,000\*  
Tuscaloosa County Circuit Court  
CV-86-97 (January 27, 1989)  
Medical malpractice involving death of a child.  
Affirmed by Alabama Supreme Court on 4/06/90.

28. *Battles' Entertainment, Inc.* \$ 800,000  
*v. First Federal Savings &*  
*Loan Association of Russell*  
*County, et al.*  
Lee County Circuit Court  
CV-88-083 (April 20, 1989)  
Fraud in connection with a sale  
of real estate.  
Settled post-trial.

29. *Robert McDonald v. Continental* 750,000  
*Casualty Company (CNA)*  
Houston County Circuit Court  
(March 9, 1989)  
Alleged tort of outrage due to  
late payment of workmen's com-  
pensation benefits.  
Motions for J.N.O.V. and/or remittitur  
denied by trial court.  
Appeal pending.

30. *Thomas v. Principal Mut. Ins. Co.* 750,000  
Mobile County Circuit Court  
CV-85-1275 (1989)  
Bad faith failure to pay \$1,000  
death benefit.  
Set aside by trial court on defendant's  
motion for J.N.O.V. - Appeal pending.

31. *Harris v. M & S Toyota, Inc.* \$ 500,000  
Jefferson County Circuit Court  
CV-86-1344 (August 22, 1989)  
Alleged fraud involving sale of used car.  
Verdict set aside on J.N.O.V.  
Appeal pending.

32. *Mallory v. Hobbs Trailers* 500,000\*  
554 So.2d 966  
(Ala. September 29, 1989)  
Jefferson County  
Wrongful death. Trial court granted defendant's motion for J.N.O.V.  
Original verdict reinstated by Supreme Court of Alabama.  
Rehearing denied.

33. *Vintage Enterprises v. Jaye* 500,000  
547 So.2d 1169 (Ala. 1989)  
Tallapoosa County  
\$500,000 punitive damages and \$20,000 compensatory, relating to sale, order, delivery of mobile home, fraud, wantonness, negligence, warranty and Magnuson-Moss theories.  
Affirmed by Alabama Supreme Court.

34. *Watson, Watson & Rutland v. Rosser Fabrap Int'l* 500,000  
U. S. District Court for Middle District of Alabama 88-H-1292-N  
(M.D. Ala. 1989)  
Intentional interference with business relationship.  
Post-trial motion pending.

**PARTIAL LIST OF ALABAMA JURY VERDICTS  
AWARDING PUNITIVE DAMAGES  
OF \$500,000 OR MORE  
FROM JANUARY 1, 1988 TO DECEMBER 31, 1988**  
(\* indicates wrongful death case)  
**1988**

1. *Turner v. Southern Life & Health Ins. Co.* \$ 5,000,000  
Macon County Circuit Court  
CV-87-91 (1988)  
Punitive damages for bad faith and fraud involving \$1,000 death benefit.  
Remitted to \$500,000.  
Appeal pending.

2. *Industrial Chemical & Fiberglass v. Chandler* 2,500,000\*  
547 So.2d 812 (Ala. 1988)  
Jefferson County  
\$3,750,000 punitive damages - \$2.5 million for wrongful death and \$1.25 million for breach of warranty.  
Affirmed by Alabama Supreme Court.

3. *Industrial Chemical & Fiberglass v. Ensley* 2,500,000\*  
547 So.2d 812 (Ala. 1988)  
Jefferson County  
\$3.75 million - \$2.5 million for wrongful death and \$1.25 million for breach of warranty.  
Affirmed by Alabama Supreme Court.

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4. *Heathcoat v. Mitchell Potts, et al.* \$ 3,000,000\*  
U. S. District Court for the Northern  
District of Alabama  
Case No. 85-7805, 85-7288 (1988)  
Wrongful death.

5. *Clardy v. Sanders* 2,750,000\*  
551 So.2d 1057 (Ala. 1989)  
Montgomery County (January 15, 1988)  
Wrongful death.  
Affirmed by Alabama Supreme Court.

6. *Proctor & Gamble Co.* 2,750,000\*  
*v. Staples*  
551 So.2d 949 (Ala. 1989)  
Colbert County (March 2, 1988)  
Wrongful death.  
Reversed on appeal.  
Settled thereafter.

7. *E & S Facilities, Inc., et al. v.* 1,750,000  
*Precision Chipper Corporation, et al.*  
Jefferson County Circuit Court  
CV-84-6422 (April 4, 1988)  
Alleged fraud in the procurement of  
products liability insurance. Verdict for  
\$875,000 each against insurance agency  
and insurance broker/wholesaler.  
Affirmed by Alabama Supreme Court  
on 4/12/90.

8. *Walls v. Colonial Mortgage Co.* 1,700,000  
Russell County Circuit Court  
CV87-194 (1988)  
Fraud involving breach of residential  
home loan commitment; compensatory  
damages of \$2,500 or less.  
Settled pending appeal.

-A 13-

9. *Trawick v. Michaels of* \$ 1,000,000  
*Oregon Co.*  
U.S. District Court for Middle  
District of Alabama 88-C-413N  
(December 21, 1988)  
Products liability involving rifle swivel.  
Appeal pending on certified question  
to Alabama Supreme Court.

10. *Williams v. Rust International* 1,000,000\*  
Jefferson County Circuit Court  
CV-82-174 (1988)  
Wrongful death.

11. *Achord v. Momar, Incorporated* 863,625  
United States District Court for the  
Middle District of Alabama,  
Northern Division No.87-D-0824-N  
(September 6, 1988)  
Products liability suit.  
Verdict includes \$500,000 punitive damages.  
No appeal.

12. *Carner, et al. v. Commercial* 811,804  
*Union Insurance Company, et al.*  
Jefferson County Circuit Court  
CV-82-3504 (1988)  
Breach of contract and bad faith.

13. *Ramsey Health Care, Inc.* 800,000  
*v. Follmer*  
24 ABR 1321  
Jefferson County Circuit Court  
CV-87-7215  
Alleged fraud.  
Affirmed by Alabama Supreme Court.

14. <i>Alabama Power Co. v. Courtney</i> 539 So.2d 170 (Ala. 1988) Chilton County Wrongful death. Affirmed by Alabama Supreme Court.	\$ 750,000*
15. <i>Consolidated Freightways v. Pacheco-Rivera</i> 524 So.2d 346 (Ala. 1988) Jefferson County Wrongful death.	525,000*
16. <i>Alabama Farm Bureau v. Hixon</i> 533 So.2d 518 (Ala. 1988) Montgomery County Wrongful death. Reversed on appeal.	500,000*
17. <i>Alabama Power Co. v. Capps</i> 519 So.2d 1328 (Ala. 1988) Butler County Wrongful death. Affirmed by Alabama Supreme Court.	500,000*
18. <i>L. W. Johnson &amp; Assoc. v. Rivers Constr. Co.</i> 532 So.2d 618 (Ala. 1988) Marion County Fraud action by construction county against developer involving \$165,000 compensatory damages. Affirmed by Alabama Supreme Court.	500,000

**PARTIAL LIST OF ALABAMA JURY VERDICTS  
AWARDING PUNITIVE DAMAGES  
OF \$500,000 OR MORE  
FROM JANUARY 1, 1987 TO DECEMBER 31, 1987**  
(\* indicates wrongful death case)  
**1987**

1. *Dale, Estate of v. Griffin, Dept. of Mental Health*  
Montgomery County Circuit Court  
CV85-138-K (1987)  
Wrongful death. \$11,701,372\*
2. *Estate of Jackson v. Phillips Petroleum Co.*  
676 F.Supp. 1142 (S.D. Ala. 1987)  
Reduced punitive damages from  
\$5,041,694.04 to \$300,000 in one case,  
and from \$2,519,439.85 to \$150,000  
in another.  
Claim for conversion, intentional  
interference with contractual relations  
and wrongful exercise of lien rights.  
New trial granted on refusal to remit  
punitive damages. 5,100,000  
2,550,000
3. *Super Valu Stores, Inc. v. Peterson*  
506 So.2d 317 (Ala. 1987)  
Etowah County  
Breach of contract and fraud in  
employment relationship.  
Affirmed by Alabama Supreme Court. 5,000,000

4. <i>Aetna Life Ins. Co. v. Lavoie</i> 505 So.2d 1050 (Ala. 1987) Mobile County \$3 million punitive damages for bad faith refusal to pay \$1,650 medical claim. Initially affirmed by Alabama Supreme Court, then vacated on appeal to U.S. Supreme Court and thereafter remitted to \$500,000 by Alabama Supreme Court and affirmed.	\$ 3,500,000
5. <i>State Farm Mutual Automobile Insurance Company v. Hollis, Adm.</i> ABR 87-808 Coffee County Circuit Court CV-853 (1987) Bad faith claim alleging negligent or wanton failure to settle lawsuit and wanton failure to file supersedeas bond. Reversed and remanded for new trial.	1,500,000
6. <i>Talmage v. Humana Hospital Florence, et al.</i> Lauderdale County Circuit Court CV-85-135 (September 10, 1987) Wrongful death. Settled post-trial.	1,500,000*
7. <i>Curry, Estate of v. Alabama Gas, et al.</i> Montgomery County Circuit Court CV86-323-G (1987) Wrongful death.	1,250,000*

8. <i>North Carolina Mut. Life. Ins. Co. v. Holley</i> 533 So.2d 497 (Ala. 1987) Tallapoosa County Bad faith. Remitted to \$500,000 by Alabama Supreme Court.	\$ 1,000,000
9. <i>Best Plant Food Products, Inc. v. Cagle</i> 510 So.2d 229 (Ala. 1987) Jackson County Breach of warranty/fraud/deceit Affirmed by Alabama Supreme Court.	972,000
10. <i>Hixon v. Village West Trail Park</i> Montgomery County Circuit Court CV-84-1447-PR (February 4, 1987) Wrongful death. Reversed and rendered on appeal.	750,000*
11. <i>Harmon v. Motors Ins. Corp.</i> 493 So.2d 1370 after remand 525 So.2d 411 (1987) Calhoun County \$500,000 punitive damages for fraud remitted to \$40,000. Affirmed conditionally.	500,000

**PARTIAL LIST OF ALABAMA JURY VERDICTS  
AWARDING PUNITIVE DAMAGES  
OF \$500,000 OR MORE \***  
**FROM JANUARY 1, 1986 TO DECEMBER 31, 1986**  
**(\* indicates wrongful death case)**  
**1986**

1.	<i>Davison v. Mobile Infirmary</i> 518 So.2d 675 (Ala. 1986) Mobile County \$8 million punitive damages for medical malpractice remitted to \$1,350,000.	\$ 8,000,000
2.	<i>Beck, Murray, Tull v. Piper Aircraft, et al.</i> Jefferson County Circuit Court CV-83-6266 (1: '6) Wrongful death.	5,175,000*
3.	<i>Black Belt Wood Yard v. Sessions</i> 514 So.2d 1249 (Ala. 1986) Jefferson County Wrongful death. Affirmed by Alabama Supreme Court.	3,500,000*
4.	<i>Patricia L. Crandall, et al. v. Rudolph V. Williams</i> 514 So.2d 1267 (Ala. 1987) Madison County Circuit Court CV-85-461, CV-85-379 consolidated (January 13, 1986) One death - \$500,000; one personal injury - \$2,500,000 (compensatory and punitive - general verdict); two personal injuries - \$2,500 each (compensatory and punitive - general verdict); one subrogation - \$30,000. Affirmed.	3,035,000*

5.	<i>Treadwell Ford, Inc. v. Campbell</i> 485 So.2d 312 (Ala. 1986) Mobile County Three plaintiffs - \$1,000,000 wrongful death; \$60,000 negligence; and \$350,000 which included compensatory damages and punitive damages for fraud involving a defect in the accelerator of a pickup truck. Affirmed by Alabama Supreme Court. Appeal dismissed by 486 U.S. 1028, 108 S.Ct. 2007, 100 L.Ed.2d 596 (U.S.Ala., May 31, 1988).	\$ 1,000,000* 350,000
6.	<i>Alabama Power Co. v. Cantrell</i> 507 So.2d 1295 (Ala. 1986) St. Clair County Wrongful death. Affirmed by Alabama Supreme Court. Appeal dismissed by 486 U.S. 1028, 108 S.Ct. 2008, 100 L.Ed.2d 596 (U.S.Ala., May 31, 1988).	1,000,000*
7.	<i>AmSouth Bank v. Speigner</i> 505 So.2d 1030 (Ala. 1986) Elmore County Wrongful completion, cashing of \$25,000 check. Settled on appeal.	1,000,000

8. *Rollison Logging Company of Alabama, Inc. v. John Ellis, et al.* Cherokee County Circuit Court CV-84-03 (May 12, 1986) Alleged fraud involving proposed purchase of logging equipment. Compensatory damages in the amount of \$78,416 and punitive damages in the amount of \$921.584. Remitted to \$200,000. \$ 1,000,000

PARTIAL LIST OF ALABAMA JURY VERDICTS  
AWARDING PUNITIVE DAMAGES  
OF \$500,000 OR MORE  
FROM JANUARY 1, 1985 TO DECEMBER 31, 1985  
(\* indicates wrongful death cases)  
1985

1. *Holt v. State Farm Mutual Auto Ins. Co.* Clay County Circuit Court CV-82-060 (1985) Fraud involving UM stacking; \$10,000 contract claim. Settled post-trial. \$25,000,000
2. *McMillian v. Massey Ferguson, Inc., et al.* Mobile County Circuit Court CV-82-686 (1985) \$10.5 million general verdict which included \$584,000 actual damages for partial leg amputation caused by alleged wantonness in design & manufacture of grain auger. Settled pending appeal. 10,500,000
3. *General Motors Corp. v. Edwards* 482 So.2d 1176 (Ala. 1985) Jefferson County Two plaintiffs at \$2 million each. Remitted by trial court to \$1.4 million each. Affirmed by Alabama Supreme Court. Overruled by *Schwartz v. Volvo North American Corp.*, 554 So.2d 927, 58 U.S.L.W. 2132 (Ala. July 28, 1989). 4,000,000\*

4. <i>May v. Lloyd Noland Foundation</i> Jefferson County Circuit Court CV-79-583 (1985) Wrongful death. Settled Post-trial.	\$ 4,000,000*
5. <i>Wright v. Superior Gas</i> Macon County Circuit Court CV-84-47 (1985) Wrongful death. Settled post-trial.	3,600,000
6. <i>American Pioneer Life Ins. Co. v. Sandlin</i> 470 So.2d 657 (Ala. 1985) Marion County \$3 million punitive damages for fraud involving \$100,000 compensatory damages. Affirmed by Alabama Supreme Court.	3,000,000
7. <i>Pasquale Food Co. v. Shakey's Inc.</i> Jefferson County Circuit Court CV-82-2606 (1985) Punitive damages for intentional interference with business relation- ship and improper acquisition of trade secrets.	3,000,000
8. <i>Hudson v. K&amp;S Industries, Inc.</i> Montgomery County Circuit Court CV-84-593 (1985) Wrongful death.	2,000,000*

9. <i>Nationwide Mut. Ins. Co. v. Clay</i> 469 So.2d 533 (Ala. 1985) Mobile County Bad faith involving \$40,000 disabil- ity claim. Affirmed by Alabama Supreme Court.	\$ 1,250,000
10. <i>Kathy Dunaway, as Mother and Custodial Parent of Daniel Allen Dunaway, a Minor, v. Alabama Power Company</i> Montgomery County Circuit Court CV-84-650-PR (December 13, 1985) Wrongful death. Appealed. JNOV for Defendant on 4/02/87. (Reversed)	500,000*

## **APPENDIX B**

**VARIOUS ALABAMA STATUTORY OFFENSES AND  
CORRESPONDING MAXIMUM FINES**

<b>Alabama Code Section</b>	<b>Offense</b>	<b>Maximum Fine</b>
Sales of Checks § 8-7-15	Failure to obtain a license	\$ 500
Deceptive Trade Practices § 80-19-11(b)	Engag'g in unconscionable false, misleading or deceptive acts or practices in the conduct of trade or commerce	\$ 2,000
Deceptive Trade Practices § 8-19-11(a)	Violation of injunction which enjoins deceptive trade practices	\$25,000
Banking and Financial Institutions § 5-19-30	Charging of interet in excess of maximum legal rate	\$ 500
Criminal Code §13A-5-11	Class A Felonies Class B Felonies Class C Felonies	\$20,000 \$10,000 \$ 5,000

<b>Alabama Code Section</b>	<b>Offense</b>	<b>Maximum Fine</b>
Criminal Code § 13A-5-12	Class A Misdemeanors Class B Misdemeanors Class C Misdemeanors	\$ 2,000 \$ 1,000 \$ 500
Health, Mental Health, Environmental Control § 22-1-11	Making false statement of material fact on application for payments from medical agencies; kickbacks, bribes	\$10,000
Health, Mental Health, Environmental Control § 22-22-14(a)	Violation of any provision of the chapter	\$25,000/day
Health, Mental Health, Environmental Control § 22-22-14(b)	Knowingly filing false statements or making false representations regarding the chapter	\$10,000
Toxic Substances in Workplace § 22-33-13	Failure to comply with the provisions of the chapter	\$ 1,000

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<b>Alabama Code Section</b>	<b>Offense</b>	<b>Maximum Fine</b>
Insurance § 27-10-37(a)	Aiding a nonadmitted insurer in willful violation of the surplus lines law	\$ 1,000
Insurance § 27-10-37(c)	Willful violation of any provision in article	\$ 1,000
Offenses involving Damage, etc., to Property	Criminal Possession of explosives	\$ 5,000
Commercial law and consumer protection	Entering combination, pool etc., to fix price or limit quantity in restraint of trade	\$ 2,000
Industrial Relations and Labor § 25-8-30	Permitting child to be employed contrary to law	\$ 500
Industrial Relations and Labor § 25-2-25	Violation of the Chapter's provisions or lawful rule or regulation of the Board of Appeals	\$ 100

-B 3-

**Alabama Code Section**

Parental Consent to  
Performing Abortion  
§ 26-21

**Offense**

Violation of provisions of Chapter

**Maximum Fine**

\$ 2,000

-B 4-

-B 5-

**ALABAMA STATUTES LIMITING  
THE AMOUNT OF PUNITIVE  
DAMAGES RECOVERABLE**

1. Code of Alabama 5-19-19 [Charge of Interest in excess of maximum, except bona fide error or accident, double damages or ten times the excess charge].
2. Code of Alabama 6-6-314 [unlawful detainer, double damages].
3. Code of Alabama 8-19-10(a)(2) [using deceptive trade practices in dealings with consumers, treble damages].
4. Code of Alabama 8-19-5(19) and (20) [using deceptive trade practices in dealings with nonconsumers, treble damages].
5. Code of Alabama 37-2-18 [liability for excessive rates charged by common carriers, treble damages].
6. Alabama Rules of Appellate Procedure, Rule 38 [frivolous appeals in civil cases, double costs].